



1-1-1992

Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective

Jean C. Love

Santa Clara University School of Law, jlove@scu.edu

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>

Recommended Citation

49 Wash. & Lee L. Rev. 67

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

PRESUMED GENERAL COMPENSATORY DAMAGES IN CONSTITUTIONAL TORT LITIGATION: A CORRECTIVE JUSTICE PERSPECTIVE

JEAN C. LOVE*

Are presumed general compensatory damages available in constitutional tort litigation in the United States? A cursory glance at recent Supreme Court decisions¹ might suggest a negative answer, but it is the thesis of this essay that the court has not categorically prohibited the recovery of presumed general damages in all types of constitutional tort actions. Rather, the Court has circumscribed the types of fact situations in which an award of presumed general damages would be appropriate.

This symposium is a tribute to Justice Powell. Like the other contributors to the symposium, I have taken this occasion to discuss opinions written by Justice Powell when he was a member of the United States Supreme Court. Unlike the other authors, however, I have not developed the theme that Justice Powell was a centrist. Rather, I have chosen to develop the theme that Justice Powell's opinions on constitutional tort damages reflect the basic principles of corrective justice.

This piece is the first in a series of articles that I intend to write about constitutional tort remedies. I have chosen to begin with a discussion of presumed general compensatory damages because these damages are the one type of common law tort remedy that the United States Supreme Court has not yet definitively extended to constitutional tort plaintiffs. It is my position that the remedy of presumed general damages ought to be available in constitutional tort litigation in any case in which the remedy is necessary to "correct injustice." I will argue in this piece that the Supreme Court has not foreclosed the recognition of an award of presumed general damages in constitutional tort litigation. In my later articles, I will identify the particular types of cases in which presumed general damages ought to be awarded and develop the criteria by which such damages ought to be assessed.

I have two audiences in mind as I write this piece. First, I am addressing civil rights lawyers, constitutional law scholars, and judges adjudicating

* Professor of Law, University of Iowa. B.A. 1965, J.D. 1968, University of Wisconsin. I am particularly indebted to the participants of both the International Symposium on the Law of Remedies and the Faculty Workshop at the University of Texas for their constructive comments in 1989 on an earlier draft of this essay. I am also grateful to Patrick Bauer, Alan Brownstein, William Buss, Patricia Cain, Robert Clinton, Dan Dobbs, Cynthia Estlund, Michael Green, Ken Kress, Emma Jordan, Samuel Issacharoff, Doug Rendleman, and Elaine Shoben for helping me to rethink the fundamental premises of this piece. Finally, I have received superb research assistance from Madolyn Crumpton and Kate Ohlandt, two of my law students at the University of Texas during the 1989-90 term.

1. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 (1986); *Carey v. Phipus*, 435 U.S. 247 (1978).

constitutional tort disputes in the United States. Second, I am addressing lawyers, scholars and judges in Commonwealth countries (such as Canada) who are turning to American precedents for guidance as they develop constitutional tort remedies in their own jurisdictions.² My objective is to assist both audiences in correctly interpreting the United States Supreme Court's decisions concerning presumed general damages.³ I will begin by analyzing the opinions very carefully, placing them in context. Then I will examine one particular type of fact situation—the denial of the right to vote—in which I believe the Supreme Court has indicated that it would be willing to allow the recovery of presumed general damages. Finally, I will focus on the voting rights case as a paradigmatic cause of action, analyzing it to identify the types of factors that might justify awards of presumed general damages in other types of constitutional tort actions.

I. PURPOSES OF COMPENSATORY DAMAGES

In common law tort litigation, compensatory damages usually are regarded as serving two functions simultaneously—compensation and deterrence. They are awarded in an amount intended to make the plaintiff whole—to compensate the plaintiff for the loss inflicted by the defendant's tortious conduct.⁴ They also are intended to deter both the defendant and others from committing comparable tortious acts in the future.⁵

In constitutional tort litigation, compensatory damages are supposed to serve the same two functions—compensation and deterrence.⁶ The problem is that, in many constitutional tort actions, plaintiffs are suing for nonpecuniary losses,⁷ such as the harm caused by the deprivation of the right to vote.⁸ It is difficult for the plaintiff to prove the monetary value of this type of loss due to its intangible nature. Yet, if the plaintiff is not successful in recovering a substantial sum of money for such a loss, then the compensatory damages award will have neither the desired compensatory nor deterrent effect.

Common-law judges have confronted a similar dilemma in dignitary tort actions for nonpecuniary losses. They have resolved the dilemma by authorizing the recovery of presumed general damages.⁹ That is, common-law judges have allowed juries to "presume" from the facts establishing the defendant's liability (*e.g.*, proof that the defendant published a libelous statement) that the plaintiff sustained a significant intangible loss (*e.g.*, loss of reputation), thereby justifying a substantial award of compensatory

2. See, *e.g.*, Ken Cooper-Stephenson, *Tort Theory for the Charter Damages Remedy*, 52 SASK. L. REV. 1 (1988).

3. See cases cited *supra* note 1.

4. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.1 (1973).

5. See generally GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

6. *Carey v. Phipps*, 435 U.S. 247, 254-57 (1978).

7. See cases cited *supra* note 1.

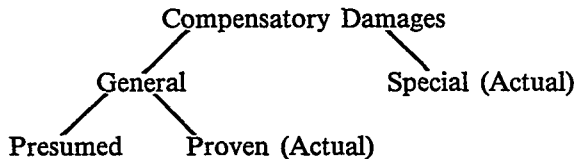
8. See cases cited *infra* part IV.A.

9. DOBBS, *supra* note 4, at 528.

damages.¹⁰ The question posed by this essay is whether judges adjudicating civil rights claims for such intangible losses as the harm caused by the deprivation of the right to vote also may authorize the recovery of presumed general damages.

II. TYPES OF COMPENSATORY DAMAGES

Because the courts and commentators do not always use the same language in describing the various types of compensatory damages, I will define the terms that I am using in this essay. Compensatory damages may be classified as follows:



“General” compensatory damages are the “damages that courts believe ‘generally’ flow from the kind of substantive wrong done by the defendant.”¹¹ “Special” (or “consequential”) compensatory damages are all other damages that are “more or less peculiar to the particular plaintiff and [that] would not be expected to occur regularly to other plaintiffs in similar circumstances.”¹² Special damages must be specifically pleaded and proved, and courts require more stringent proof of special damages than of general damages.¹³

General damages may be either “presumed” or “proven.” Usually, they are proven. “Proven general damages” require proof of the fact of harm and, to the extent feasible, proof of the extent of harm.¹⁴ For example, a plaintiff who is negligently injured in an automobile accident must prove both the fact of physical injury and the amount of pain and suffering flowing from that physical injury. If the plaintiff also sustains personal property damage, then the plaintiff must prove both the fact of harm to the property and the value of the harm done to the property. In addition to being entitled to an award of “proven general damages,” the accident victim will be allowed to recover special damages for individualized losses, such as medical expenses and lost earning capacity. Both “proven general

10. See generally RODNEY A. SMOLLA, *LAW OF DEFAMATION* (1991).

11. DOBBS, *supra* note 4, at 138. The RESTATEMENT (SECOND) OF TORTS § 904 (1979), defines general damages as “compensatory damages for a harm so frequently resulting from the tort that is the basis of the action that the existence of the damages is normally to be anticipated and hence need not be alleged to be proved.”

12. DOBBS, *supra* note 4, at 138.

13. *Id.* at 139.

14. “Proven general damages” is a term that I have created to describe general damages that are not presumed.

damages" and "special damages" may be described as "actual damages," meaning that they are awarded for actual, proven losses.¹⁵

General damages rarely are presumed. When presumed damages are recoverable, courts infer both the fact of harm and the extent of harm from the circumstances surrounding the defendant's conduct.¹⁶ For example, if the plaintiff has established liability in a common law action for libel *per se* or slander *per se*, then the court will award (1) nominal damages based on an inference that the plaintiff in fact sustained reputational harm,¹⁷ and (2) presumed general damages based on an inference that the plaintiff sustained a substantial amount of both reputational and psychic (or emotional) harm.¹⁸ The plaintiff will be permitted to offer specific evidence of the reputational or psychic harm, but this proof will not be required¹⁹ unless the defendant successfully rebuts the presumption of general damages by proving that the plaintiff's reputation was a poor one.²⁰ Once the defendant offers such evidence, the plaintiff will have to submit counter-proof of a good reputation²¹ in order to recover a substantial amount of general damages. If the plaintiff fails to present counter-proof, the plaintiff's recovery may be reduced to a small amount of general damages or to a judgment for nominal damages only.²²

Presumed general damages also are recoverable at common law in actions for offensive battery, assault, false imprisonment, malicious

15. In both *Carey v. Phipps*, 435 U.S. 247, 264 (1978), and *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306-07 (1986), after rejecting the plaintiffs' request for presumed general damages, the Supreme Court allowed the recovery of damages for "actual injury." I will use the term "actual damages" to describe compensation for such "actual injury." The Supreme Court failed to emphasize in *Carey* and *Stachura* that "damages for actual injury" may be either general or special. As a result, some people confuse "actual damages" with "special damages."

16. THE RESTATEMENT (SECOND) OF TORTS § 904 cmt. a (1979) states that "there need be no proof of the extent of the harm, since the existence of the harm may be assumed and its extent is inferred as a matter of common knowledge from the existence of the injury."

17. SMOLLA, *supra* note 10, § 9.02[1] (Mar. 1989); *Developments in the Law of Defamation*, 69 HARV. L. REV. 875, 877-91 (1956). By contrast, in actions for libel *per quod* or slander, the plaintiff must prove "special damages" in order to establish liability. CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 116 (1935).

For an excellent discussion of the three concepts of reputation—property, honor and dignity—see Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986).

For a criticism of the common law rules, see Francis D. Murnaghan, *From Fictum to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 CATH. U. L. REV. 1 (1972) (advocating adoption of new rule allowing only recovery of proven general damages in common law defamation actions).

18. SMOLLA, *supra* note 10, § 9.05[1] (Mar. 1989).

19. MCCORMICK, *supra* note 17, § 116.

20. SMOLLA, *supra* note 10, § 9.10[4][a], [b] (Feb. 1990); S. M. WADDAMS, *THE LAW OF DAMAGES* 302-03 (1983).

21. HARVEY MCGREGOR, *DAMAGES* 1679-84 (15th ed. 1988).

22. SMOLLA, *supra* note 10, § 9.10[4][b] (Feb. 1990). In dire circumstances, the plaintiff's reputation may sink so low that the plaintiff's cause of action is dismissed altogether. *Id.* § 9.10[4][d] (Feb. 1990).

prosecution²³ and invasion of privacy.²⁴ Courts will award nominal damages in these actions based on the inferred *fact* of psychic harm and substantial sums of presumed general damages based on the inferred *amount* of psychic harm. Although rebuttal evidence is admissible, the defendants in these cases typically do not offer evidence disproving the presumption of psychic harm. A plaintiff who is entitled to receive presumed general damages in one of these common-law actions also is entitled to receive special damages for individualized losses such as medical expenses or lost earning capacity.

III. PRESUMED GENERAL DAMAGES FOR THE INHERENT VALUE OF A CONSTITUTIONAL RIGHT

The first United States Supreme Court decision to consider whether presumed general damages should be recoverable in constitutional tort litigation was *Carey v. Phipus*,²⁵ an action for a deprivation of procedural due process. Prior to *Carey*, several commentators had developed a "grand theory" about the overriding importance of the deterrent function of compensatory damages in constitutional tort litigation.²⁶ To ensure that awards of compensatory damages would be large enough to have the desired deterrent effect, these commentators recommended the recognition of "presumed general damages" in the form of "quasi-punitive damages" for the "inherent value of a constitutional right." These damages were to be awarded in all constitutional tort actions, regardless of the nature of the harm actually sustained by the plaintiff and regardless of the defendant's state of mind. The Court in *Carey* rejected the basic premise of this grand theory.²⁷ It refused to place any special emphasis on the deterrent function of compensatory damages in civil rights litigation. The Court phrased its decision in the language of statutory interpretation: "To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."²⁸

Specifically, the Court in *Carey* reversed the court of appeals' ruling that "substantial nonpunitive" damages should be recoverable without any

23. DOBBS, *supra* note 4, at 528.

24. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 964-66 (1989).

25. 435 U.S. 247 (1978).

26. See Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 464-67 (1978); Doug Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531, 666-67 (1975); Mark G. Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1366-83 (1976); John G. Niles, Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015 (1967).

27. *Carey v. Phipus*, 435 U.S. 247, 256-57 (1978).

28. *Id.*

proof of actual harm²⁹ by two high school students who had been suspended from school without a hearing for twenty days, but who were readmitted on the eighth and seventeenth days of their suspensions pursuant to pretrial injunctions issued by the trial court judge.³⁰ The Court expressly declined to adopt the plaintiffs' theory that "constitutional rights are valuable in and of themselves," and that an award of presumed general damages is needed "to deter violations of constitutional rights."³¹ Instead, the Court ruled that, on remand, the trial court could award the plaintiffs only (1) proven general damages for the "emotional distress actually . . . caused by the denial of procedural due process itself";³² and (2) special damages "to compensate them for injuries caused by the suspensions"³³ (e.g., damages for the pecuniary value of each day of school that they had missed and damages for the emotional distress that they had experienced as a result of the suspensions). The plaintiffs could recover proven general damages regardless of whether the suspensions were justified, but special damages would be recoverable only if the suspensions were unjustified.³⁴ Additionally, the Seventh Circuit ruled that, on remand, the trial court should shift the burden of proof on the issue of causation in the special damages claims to the defendants. That is, to avoid liability for special damages, the defendants would have to prove that the plaintiffs "would have been suspended even if a proper hearing had been held."³⁵ The burden of persuasion was shifted because the defendants would have had the burden of proving that the suspensions were legally justified had they conducted the constitutionally required hearing.

Carey thus can be characterized as a case in which the Court refused to recognize presumed general damages for the inherent value of a deprivation of procedural due process. The post-*Carey* commentators sharply criticized the Court for refusing to recognize presumed general damages in actions for denials of procedural due process.³⁶ Realizing, however, that the Court was unlikely to reverse itself, these commentators concentrated on the question left unanswered by *Carey*: Should presumed general damages be available in actions for violations of *substantive* constitutional rights? The post-*Carey* commentators tried to resuscitate the "grand theory" re-

29. *Id.* at 252-53, 264. The plaintiffs had sought \$5,000 in presumed and punitive damages. *Id.* at 251.

30. *Id.* at 248-52.

31. *Id.* at 254.

32. *Id.* at 263.

33. *Id.* at 260.

34. *Id.* at 260, 263, 266-67.

35. *Id.* at 260.

36. See SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 4.03 (2d ed. 1986); Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242 (1979); Note, *Damages Awards for Constitutional Torts: A Reconsideration after Carey v. Phipps*, 93 HARV. L. REV. 966 (1980); see also Marilyn L. Pilkington, *Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms*, 62 CAN. B. REV. 517 (1984).

garding the overriding importance of the deterrent function of compensatory damages in constitutional tort litigation.³⁷ They argued that *Carey*'s rejection of the deterrent theory had been restricted to actions for deprivations of procedural due process, and they encouraged the courts to authorize the recovery of presumed general damages in all actions for violations of substantive constitutional rights.

A few federal and state court judges followed the advice of the post-*Carey* commentators.³⁸ They ruled that presumed general damages were recoverable in actions for violations of substantive constitutional rights, and they gave the following pattern jury instruction, which first appeared in *Herrera v. Valentine*:³⁹

If you find that the plaintiff has been deprived of a constitutional right, you may award damages to compensate her for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place upon constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.

The precise value you place upon any constitutional right which you find was denied to plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, and the significance of the right in the context of the activities which the plaintiff was engaged in at the time of the violation of the right.⁴⁰

In one line of cases, the judges who gave the *Herrera* instruction asked the jury to return a *special* verdict identifying the precise amount of any presumed general damages awarded for the inherent value of a constitutional right. For example, in *Lewis v. Harrison School District No. 1*,⁴¹ a high school principal whose wife had been transferred to another district, who had protested the personnel decision at a public school board meeting, and who then had been fired in violation of his First Amendment right to

37. For example, a student commentator who was advocating the recognition of presumed general damages for violations of the Fourth Amendment relied heavily upon the deterrent theory developed prior to *Carey* by Dean Yudof. Comment, *Presumed Damages for Fourth Amendment Violations*, 129 U. PA. L. REV. 192, 220 (1980).

38. See cases cited *infra* notes 39-46. Other courts awarded only proven general damages. See, e.g., *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980).

39. 653 F.2d 1220 (8th Cir. 1981).

40. *Herrera v. Valentine*, 653 F.2d 1220, 1227 (8th Cir. 1981).

41. 805 F.2d 310 (8th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987).

freedom of speech was awarded presumed general damages "for the violation of [his] first amendment right" in the amount of \$5,000 plus special damages for back pay in the amount of \$25,348. In *City of Riviera Beach v. Fitzgerald*,⁴² a police officer who had been denied a hearing on his claim that he was arbitrarily deprived of a promotion was awarded \$125,000 "for the denial of [substantive] due process of law" and \$45,000 for lost wages. And in *Young v. City of Centreville*,⁴³ a man who had been shot in the back by a police officer using excessive force in making an arrest was awarded \$25,000 "for the value of his lost constitutional rights" under the Fourth Amendment and \$5,000 in special damages for his one-week hospitalization.

In another line of cases, the judges who gave the *Herrera* instruction told the jury to return a *general* verdict for presumed general, proven general, and special compensatory damages. Such a general verdict encompassed a wide range of losses, including lost wages, emotional distress, and the inherent value of the substantive constitutional right at issue. For example, in the *Herrera* case itself,⁴⁴ an Indian woman who was visibly in the later months of pregnancy had been kicked in the stomach by a police officer, in violation of her Fourteenth Amendment right to liberty, when he was attempting to arrest her husband. The officer then forced her into the back of his patrol car and ignored her pleas for medical attention. Instead of driving her a few blocks to a hospital, he took her twenty miles to the county jail. Her unborn child died in her womb and was delivered dead two weeks later. The jury was told to assess damages based upon her physical pain and suffering, her emotional distress, and the value of her constitutional rights. It returned a general verdict of \$300,000 in compensatory damages, which was affirmed on appeal.

Similarly, in *Corriz v. Naranjo*,⁴⁵ an eighteen-year-old young man was shot in the back by a police officer who had just ordered him to leave the scene of an arrest, in violation of his right to liberty under the Fourteenth Amendment. The jury was told to award damages for the young man's medical expenses, lost earnings, pain and suffering, emotional distress and the value of his constitutional rights. The trial judge gave the *Herrera* instruction and also told the jury that the value of a constitutional right, "while difficult to assess, must be considered great."⁴⁶ The jury returned a verdict of \$30,000 in compensatory damages, which was affirmed on appeal.

Both of these lines of cases awarding presumed general damages for the inherent value of a substantive constitutional right pursuant to the *Herrera* instruction were disapproved by the Supreme Court in *Memphis*

42. 492 So. 2d 1382 (Fla. Dist. Ct. App. 1986), *review denied*, 503 So. 2d 326 (Fla. 1987).

43. 523 N.E.2d 621 (Ill. App. Ct. 1988).

44. *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981).

45. 667 F.2d 892 (10th Cir. 1981), *cert. granted*, 456 U.S. 971, and *cert. dismissed*, 458 U.S. 1123 (1982).

46. *Corriz v. Naranjo*, 667 F.2d 892 (10th Cir. 1981), *cert. granted*, 456 U.S. 971, and *cert. dismissed*, 458 U.S. 1123 (1982).

Community School District v. Stachura.⁴⁷ The plaintiff in *Stachura* was a tenured teacher who had shown films regarding human sexuality in his seventh-grade life science class. In April of 1979, after parental and community protest, he was suspended with pay but without an adequate hearing, in violation of both his right to procedural due process and his First Amendment right to free speech. He filed a section 1983 action during the summer of 1979, and, as a result, he was reinstated at the beginning of the fall term.⁴⁸ He then pursued his claim for compensatory and punitive damages. He proved at the trial that he was "embarrassed" by extensive publicity in the local media, which repeated the allegations against him, including the charge that he was a "sex maniac." News of the event "went around the world" and was reported by *Esquire* magazine in its Dubious Achievement Awards. He and his family received harassing phone calls, and refuse was left on their porch. He became very withdrawn from his friends and family.⁴⁹ The jury was told that it could award Stachura three types of compensatory damages: Proven general damages for his loss of reputation and emotional distress; special damages for his out-of-pocket expenses; and presumed general damages for the inherent value of his constitutional rights.⁵⁰ The jury received the *Herrera* instruction.⁵¹ It returned a general verdict for compensatory damages against the school board and the individual defendants in the amount of \$275,000, which was reduced to \$266,750 after the trial court entered judgment notwithstanding the verdict as to one of the individual defendants.⁵² The jury also awarded a total of \$36,000 in punitive damages against the nine individual defendants.⁵³

The Sixth Circuit affirmed the general verdict for compensatory damages on the theory that "there was ample proof of actual injury to plaintiff Stachura both in his effective discharge by the Memphis Community School District and by the damage to his reputation and to his professional career as a teacher."⁵⁴ The appellate court believed that the jury "could have found, as it did, actual and important damages."⁵⁵ The Sixth Circuit thus affirmed the verdict without discussing the *Herrera* jury instruction. Implicitly, the Sixth Circuit held that even if the trial court judge had erred in giving the *Herrera* instruction, nevertheless the error was harmless because the plaintiff had put in sufficient proof of actual harm to justify the verdict.

47. 477 U.S. 299 (1986).

48. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 300-01 (1986).

49. This statement of the proven facts is taken from the court of appeals' opinion. *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985), *rev'd sub nom.* *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 (1986).

50. *Stachura*, 477 U.S. at 302.

51. *Id.* at 302-03.

52. *Id.* at 303.

53. *Id.*

54. *Stachura v. Truszkowski*, 763 F.2d 211, 214 (6th Cir. 1985), *rev'd sub nom.* *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 (1986).

55. *Id.*

The Supreme Court reversed the Sixth Circuit's decision and remanded for a new trial on the issue of compensatory damages.⁵⁶ The Court ruled that the submission of the *Herrera* instruction constituted prejudicial error because the instruction authorized the recovery of "noncompensatory damages" measured by the jury's "subjective perception of the importance of constitutional rights as an abstract matter."⁵⁷ The error required a new trial because there was no way to determine how much of the general verdict reflected the jury's estimation of the value of the infringed constitutional rights and how much of it reflected the jury's award of proven general and special damages for the actual monetary and nonmonetary harms sustained by the plaintiff.⁵⁸

Justice Powell, writing for the Court in *Stachura*, explicitly disapproved those lower court decisions that had distinguished between violations of substantive constitutional rights and deprivations of procedural due process, allowing the recovery of "noncompensatory" damages for "the abstract value" of substantive rights.⁵⁹ He justified the Court's rejection of presumed general damages for the "inherent value" of a constitutional right by emphasizing the fact that the common law does not authorize the recovery of any type of damages for the "inherent value" of a legal right. Instead, common-law tort damages are "designed to provide *compensation* for the *injury* caused to [the] plaintiff."⁶⁰ He acknowledged that "[d]eterrence is also an important purpose" of tort damages, but he observed that the deterrent function of compensatory damages "operates through the mechanism of damages that are *compensatory*—damages grounded in determinations of plaintiff's actual losses."⁶¹

With respect to the availability of presumed general damages for the "injuries caused by the deprivation" of a constitutional right, Justice Powell took the position that this particular issue had not been raised by the plaintiff in *Stachura*.⁶² By requesting *proven* general compensatory damages for the "harm caused by the violation" of his First Amendment rights, the plaintiff had waived his right to request *presumed* general damages for this harm because "[p]resumed damages are a *substitute* for ordinary compensatory damages, not a *supplement* for an award that fully compensates."⁶³ Despite the fact that the plaintiff had not raised the issue properly, Justice Powell did provide some general guidance to the lower courts on the question of whether it is appropriate to award presumed general damages for injuries

56. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 313 (1986). Upon remand, the parties settled for approximately \$200,000. Telephone interview with Erwin B. Ellman of Levin, Levin, Garvett and Dill, P.C., Plaintiff's counsel in *Stachura* (Nov. 1990).

57. *Stachura*, 477 U.S. at 308.

58. *Id.* at 312-13.

59. *Id.* at 304, 309-10.

60. *Id.* at 306 (emphasis added).

61. *Id.* at 307 (emphasis added).

62. *Id.* at 309 n.13.

63. *Id.* at 310-12.

caused by deprivations of constitutional rights. First, he interpreted section 1983 as presupposing that damages which "compensate for actual harm ordinarily suffice to deter constitutional violations."⁶⁴ Second, he observed that presumed general damages "may possibly be appropriate" when a plaintiff seeks compensation for an injury that is "likely to have occurred but difficult to establish" because "presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure."⁶⁵

The key to the Court's reasoning in *Carey* and *Stachura* is to be found in Justice Powell's characterizations of what I have called "presumed general damages for the inherent value of a constitutional right." In *Carey*, Justice Powell referred to such damages as "substantial nonpunitive" damages.⁶⁶ In *Stachura*, he described them as "noncompensatory damages."⁶⁷ In both cases, he expressed concern that the plaintiffs were asking the Court to authorize the recovery of a greater sum of money than they would have been able to obtain under the rules governing common-law tort damages.

In *Carey*, the plaintiffs had been unsuccessful in their efforts to recover punitive damages because they had failed to prove malice.⁶⁸ Justice Powell thought that they were trying to avoid the relevant state-of-mind requirement by asking for "quasi-punitive" damages in the form of presumed general damages for the inherent value of their procedural due process rights. He was not willing to allow them to recover the equivalent of punitive damages without proof of malice.

In *Stachura*, the plaintiff had recovered proven general and special compensatory damages for his monetary and nonmonetary harms. He had also received an award of punitive damages, which was not challenged on appeal.⁶⁹ Justice Powell thought that the plaintiff was trying to recover an additional sum of "noncompensatory" damages measured by the value of his constitutional rights. The Court was not willing to allow the plaintiff to recover such "deterrent damages" in addition to compensatory and punitive damages.

Carey and *Stachura* thus stand for the proposition that the Supreme Court will not allow the recovery of presumed general damages for the inherent value of either a procedural or a substantive constitutional right. The Court is concerned that such damages never have been recognized by the common law, and that they would be an "unwieldy tool for ensuring compliance with the Constitution."⁷⁰ Moreover, the Court perceives a distinct danger that allowing the recovery of such damages would "inject

64. *Id.* at 310.

65. *Id.* at 310-11.

66. *Carey v. Phipps*, 435 U.S. 247, 253 (1978).

67. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 309-10 (1986).

68. 435 U.S. at 257 n.11.

69. *Stachura*, 477 U.S. at 302-03.

70. *Id.* at 310.

caprice into determinations of damages in § 1983 cases.”⁷¹ Specifically, the Court is concerned that juries would be free to award “arbitrary amounts without any evidentiary basis” because “history and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections.”⁷²

Although Justice Powell did not refer to principles of corrective justice in either *Carey* or *Stachura*, I believe that the theory of corrective justice advanced by Professor Ernest Weinrib⁷³ supports Justice Powell’s reasoning. Professor Weinrib develops the Aristotelian distinction between two forms of justice: Corrective justice and distributive justice.⁷⁴ Corrective justice is a bilateral process of adjudication designed to rectify the harm that a wrongdoer has caused to a victim.⁷⁵ Distributive justice is a multilateral process of dividing a benefit or a burden in accord with a collectively determined criterion, such as merit or need.⁷⁶ Professor Weinrib takes the position that corrective justice is the form underlying tort law.⁷⁷ He then argues that tort liability should be understood as serving a single, comprehensive objective—“correcting injustice.” He rejects the functionalist notion that tort liability serves one or more utilitarian goals, such as compensation or deterrence.⁷⁸ It follows from Professor Weinrib’s theory regarding tort liability that the purpose of compensatory damages is to “correct injustice,” not simply “to compensate” or “to deter.”

One can characterize the *Carey* request for “quasi-punitive damages”⁷⁹ and the *Stachura* request for “noncompensatory damages”⁸⁰ as requests for damages designed solely to deter violations of the United States Constitution. Justice Powell’s opinions rejected these requests for “deterrence damages” and limited the award of compensatory damages in section 1983 actions to the value of the harm caused to the victim by the wrongdoer.⁸¹ Justice Powell explained the Court’s decision by saying that he could find no evidence of Congressional intent to “establish a deterrent more formidable than that inherent in the award of compensatory damages.”⁸² Professor Weinrib’s theory of corrective justice validates Justice Powell’s reasoning. Since constitutional tort actions are grounded in common-law tort actions, which are premised on principles of corrective justice, the Court properly authorized the recovery of compensatory damages to “correct injustice,”

71. *Id.*

72. *Id.*

73. Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989).

74. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 976-81 (1988).

75. *Id.* at 978.

76. *Id.* at 979.

77. *Id.* at 978.

78. Weinrib, *supra* note 73, at 501-03, 510-14, 525-26.

79. *See supra* text accompanying note 66.

80. *See supra* text accompanying note 67.

81. *See supra* text accompanying note 60.

82. *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978).

but not to "deter constitutional deprivations." By ruling that compensatory damages in constitutional tort actions should be recoverable for no more and no less than the full extent of the harm caused to the victim by the wrongdoer, the Court ensured that constitutional tort plaintiffs would be made whole and that defendants would be deterred from engaging in future misconduct without overemphasizing the goal of deterrence.

IV. PRESUMED GENERAL DAMAGES FOR THE NONMONETARY HARM CAUSED BY A DEPRIVATION OF A CONSTITUTIONAL RIGHT

Although the Supreme Court has refused to award presumed general damages for the "inherent value" of a constitutional right, it has not foreclosed the possibility of authorizing presumed general damages for certain nonmonetary harms caused by the deprivation of a constitutional right.⁸³ In both *Carey* and *Stachura*, the Court explicitly reserved the question of whether presumed general damages should be recoverable in actions for a denial of the constitutional right to vote.⁸⁴ In *Carey*, Justice Powell spoke in terms of the possibility of authorizing presumed general damages for "wrongful deprivations of the right to vote."⁸⁵ In *Stachura*, Justice Powell abandoned the terminology of granting damages for "the deprivation" of the right to vote and talked instead about awarding damages for "the particular loss that the plaintiff suffered" as a result of a denial of the right to vote.⁸⁶ He characterized the loss as a "nonmonetary harm that cannot easily be quantified."⁸⁷ Because such a loss is the type of injury that "is likely to have occurred, but difficult to establish,"⁸⁸ it is a loss for which an award of presumed general damages might be appropriate.⁸⁹

83. See *supra* text accompanying notes 62-65.

84. *Carey*, 435 U.S. at 264 n.22; *Stachura*, 477 U.S. at 311 n.14.

85. 435 U.S. at 264 n.22.

86. 477 U.S. at 311 n.14.

87. *Id.*

88. *Id.* at 310-11.

89. *Id.* at 311 n.14. The post-*Stachura* commentators have not focused explicitly on the issue of whether presumed general damages might be available for certain types of harms in constitutional tort litigation. Instead, they have questioned whether compensation or deterrence is the central function of compensatory damages in constitutional tort litigation. See, e.g., John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461 (1989) (emphasizing compensatory function); Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997 (1990) (emphasizing deterrent function); Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 369-71 (1989). See generally Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989); John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989); Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719 (1989); Daniel L. Rotenberg, *Private Remedies for Constitutional Wrongs—A Matter of Perspective, Priority and Process*, 14 HASTINGS CONST. L.Q. 77 (1986); Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53 (1986) (advocating corrective justice approach to constitutional tort litigation); Case Comment, 100 HARV. L. REV. 267 (1986) (discussing *Stachura*).

The modification in Justice Powell's description of the harm suffered by a voting rights plaintiff is significant. It underscores the fact that, although the Court will not recognize presumed general damages for *abstract deprivations* of constitutional rights, the Court might be willing to allow the recovery of presumed general damages for certain *intangible injuries* caused by violations of constitutional rights. Moreover, allowing the recovery of presumed general damages for certain intangible injuries would be completely consistent with Professor Weinrib's theory of corrective justice.⁹⁰ When an intangible injury "is likely to have occurred, but difficult to establish,"⁹¹ the plaintiff may not be able to submit sufficient evidence to justify a substantial award of proven compensatory damages. In such a case, proven general compensatory damages are not an adequate remedy to rectify the wrong. But if the plaintiff is allowed to recover presumed general damages, then the plaintiff will receive compensatory damages in an amount that "may roughly approximate the harm that the plaintiff suffered,"⁹² and the judgment for compensatory damages will be large enough to "correct injustice."

A. Presumed General Damages for the Nonmonetary Harm Caused by a Deprivation of the Right to Vote

In both *Carey* and *Stachura*, Justice Powell focused on the voting rights fact pattern.⁹³ He used it as a vehicle for discussing the possibility of awarding presumed general damages in constitutional tort litigation because there is common-law precedent dating back to the 1700s that authorizes the recovery of presumed general damages in common-law tort actions for the harm caused by the deprivation of the right to vote. The original case was *Ashby v. White*,⁹⁴ in which the plaintiff was the victim of an isolated, arbitrary denial of the right to vote. The House of Lords reinstated the trial court's damage award of 200 pounds, adopting without discussion the dissenting opinion written by Chief Justice Holt in the intermediate court of appeals. Chief Justice Holt pronounced that "[t]he right of voting . . . is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it."⁹⁵ He justified the award of presumed general damages by saying "surely every injury imports a damage, though it does not cost the party one farthing."⁹⁶ Specifically, he drew analogies to the presumed general damages recoverable in actions for defamation and offensive battery:

As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an

90. See *supra* text accompanying notes 73-82.

91. *Stachura*, 477 U.S. at 310-11.

92. *Id.*

93. See cases cited *supra* note 84.

94. 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1703).

95. *Ashby v. White*, 2 Ld. Raym. 938, —, 92 Eng. Rep. 126, 136 (K.B. 1703).

96. *Id.* at —, 92 Eng. Rep. at 137.

action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury.⁹⁷

Based on these analogies, the House of Lords allowed the jury to infer both the fact and the extent of the harm from the circumstances surrounding the defendant's misconduct.⁹⁸ It noted that the purpose of this award of presumed general damages was not only to compensate the plaintiff, but also to deter such misconduct by public officials in the future.⁹⁹

The precedent set in *Ashby v. White* has been followed in this country on several occasions. The Supreme Court¹⁰⁰ and the lower federal courts¹⁰¹ followed *Ashby* in the voting rights cases that were litigated in the early 1900s. Black plaintiffs filed voting rights complaints under the Fourteenth and Fifteenth Amendments,¹⁰² and white plaintiffs who had been deprived of their right to vote in federal elections sued under the general federal question statute.¹⁰³ Under both statutes, the courts had to decide whether to recognize a cause of action for damages allegedly caused by the deprivation of a constitutionally created, "political" right.¹⁰⁴ The issue was resolved affirmatively in *Nixon v. Herndon*,¹⁰⁵ an action brought under the Fourteenth Amendment by a black man against election officials in Texas for refusing to permit him to vote in a Democratic primary election on account of his race. The Court ruled that the plaintiff could proceed with his claim for \$5,000 in general compensatory damages.¹⁰⁶ The Court said: "That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*."¹⁰⁷ A lower federal court reached the same conclusion in *Wayne v. Venable*,¹⁰⁸ a case brought under the general federal question statute. In *Wayne*, a white male was allowed to recover \$2,000 in general compensatory damages against election officials in Arkansas who had denied him his right to vote in a federal election.¹⁰⁹

97. *Id.*

98. *Id.*

99. *Id.*

100. *E.g.*, *Nixon v. Herndon*, 273 U.S. 536 (1927).

101. *E.g.*, *Wayne v. Venable*, 260 F. 64 (8th Cir. 1919).

102. *See Nixon v. Herndon*, 273 U.S. 536 (1927); *Myers v. Anderson*, 238 U.S. 368 (1915). *See generally* Emma C. Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389 (1985); Grier Stephenson, *The Supreme Court, The Franchise, and the Fifteenth Amendment: The First Sixty Years*, 57 UMKC L. REV. 47 (1988).

103. *See Swafford v. Templeton*, 185 U.S. 487 (1902); *Wiley v. Sinkler*, 179 U.S. 58 (1900).

104. *E.g.*, *Nixon v. Herndon*, 273 U.S. 536 (1927).

105. *Id.*

106. *Id.* at 540.

107. *Id.*; *accord*, *Lane v. Wilson*, 307 U.S. 268 (1939).

108. 260 F. 64 (8th Cir. 1919).

109. *Wayne v. Venable*, 260 F. 64, 65, 70 (8th Cir. 1919).

Once the Court had decided to allow the recovery of general compensatory damages for the violation of a constitutionally created, "political" right, it became necessary to determine how to measure the extent of the harm caused by the deprivation of such a right. The issue surfaced most frequently in the cases filed under the general federal question statute because the statute contained a jurisdictional amount requirement. That requirement came before the Court in *Wiley v. Sinkler*,¹¹⁰ a case in which a white man who had been denied the right to vote in a federal election sued for \$2,500 in general compensatory damages. The defendant demurred on the ground that the court lacked jurisdiction "because it appeared on the face of the complaint that a verdict for [the jurisdictional amount of] \$2,000 would be so excessive that the court would be required to set it aside."¹¹¹ The Court rejected the defendant's argument on the theory that

[the] amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of the jury, and no opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the Circuit Court.¹¹²

Later, a federal appellate court in *Wayne v. Venable*¹¹³ described the method for measuring the extent of harm caused by a deprivation of the right to vote in a federal election as follows:

In the eyes of the law this right is so valuable that damages are *presumed* from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right.¹¹⁴

Thus, the *Wayne* court acknowledged that it would be extremely difficult for the plaintiff to offer proof of the extent of the nonmonetary harm caused by the deprivation of the right to vote. To solve this problem, the court followed the common-law tradition established in *Ashby v. White*, recognizing presumed general damages as the appropriate remedy.

When Justice Powell reviewed the voting rights cases in *Stachura*, he observed that the language in *Wayne*¹¹⁵ could be interpreted as authorizing the recovery of presumed general damages "for the value of the right to vote."¹¹⁶ Justice Powell insisted, however, that such an interpretation would be a misreading of the text. He took the position that *Wayne* involved

110. 179 U.S. 58 (1900).

111. *Wiley v. Sinkler*, 179 U.S. 58, 60 (1900).

112. *Id.* at 65.

113. 260 F. 64 (8th Cir. 1919).

114. *Id.* at 66 (emphasis added).

115. See *supra* text accompanying note 114.

116. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 311-12 n.14 (1986).

"nothing more than an award of presumed damages for a non-monetary harm that cannot easily be quantified."¹¹⁷ He elaborated upon his position as follows:

The "value of the right" in the context of these decisions [*Wayne* and *Ashby*] is the money value of the particular loss that the plaintiff suffered—a loss of which "each member of the jury has personal knowledge." It is *not* the value of the right to vote as a general, abstract matter, based on its role in our history or system of government.¹¹⁸

The difference between awarding presumed general damages for the inherent value of the right to vote and awarding such damages for the particular nonmonetary loss caused by a deprivation of the right to vote is illustrated by the settlement agreement in a recent voting rights case, *Vargas v. Calabrese*.¹¹⁹ In *Vargas*, the plaintiffs, who were African-American and Hispanic registered voters, brought a class action for interference with their voting rights during a mayoral election in Jersey City. They alleged that the defendants had prevented or discouraged them from voting in the 1985 run-off election, and they sought compensatory damages.¹²⁰ The court found that the plaintiffs had been the victims of unconstitutional, isolated deprivations of the right to vote.¹²¹ Because they had sustained an intangible loss that could not easily be quantified, the court ruled that the plaintiffs were entitled to recover presumed general damages.¹²²

The class of approximately 1,000 plaintiffs entered into a settlement agreement with the individual defendants for \$590,000. Each plaintiff was entitled to the payment of "nominal damages" in the amount of \$50.¹²³ So-called "damage points" were then allocated to each plaintiff, ranging from one to three points, depending upon whether the person "was subjected to obstacles in voting (1 point), or was subjected to harassment, intimidation

117. *Id.*

118. *Id.*

119. 634 F. Supp. 910 (D.N.J. 1986), *aff'd*, 949 F.2d 665 (3d Cir. 1991).

120. *Vargas v. Calabrese*, 634 F. Supp. 910, 913 (D.N.J. 1986), *aff'd*, 949 F.2d 665 (3d Cir. 1991). As originally filed, the complaint in *Vargas* also sought injunctive and declaratory relief on the theory that the defendants had been acting pursuant to the New Jersey Election Laws, which allegedly violated the First and Fourteenth Amendments of the United States Constitution. *Id.* The *Vargas* court ruled, however, that the New Jersey Election Laws did not authorize the defendants' conduct. *Id.* at 930. Consequently, the case was transformed into an action primarily for substitutionary relief for the unconstitutional, statutorily unauthorized deprivation of the plaintiffs' right to vote. In addition to the substitutionary relief, the plaintiffs obtained a consent decree from the government defendants agreeing to protect the rights of minority voters in the upcoming Gubernatorial Election. *Id.* at 913.

121. *Id.* at 930.

122. *Vargas v. Calabrese*, No. 85-4125, slip op. at 27-29 (D.N.J. Mar. 5, 1990), *aff'd*, 949 F.2d 665 (3d Cir. 1991). I received a copy of this unpublished opinion from one of the plaintiffs' lawyers, Professor Samuel Issacharoff. A copy of the trial court's opinion is on file with the *Washington & Lee Law Review*.

123. *Id.* at 8.

or abuse (2 points) or was actually prevented from voting (3 points)."¹²⁴ The money remaining in the settlement fund after the payment of nominal damages was to be distributed in accordance with the damage points.¹²⁵

The trial court ruled in March of 1990 that the terms of the settlement agreement were not "unreasonable,"¹²⁶ and, therefore, the defendants' liability insurer would be required to indemnify the defendants under the terms of the defendants' comprehensive business insurance policy.¹²⁷ The trial court correctly held that neither *Carey* nor *Stachura* precluded the recovery of presumed general damages in a voting rights case. Furthermore, the court correctly observed that "deprivations of the right to vote are precisely the type of [presumed] actual damages, even if difficult to quantify, that may properly be based on a jury's determination of what the presumed harm might have been for the jury [if the jurors had] suffered the unlawful conduct."¹²⁸

The settlement agreement in *Vargas* is an excellent vehicle for thinking about the difference between the "presumed general damages for the inherent value of a constitutional right" prohibited by *Carey* and *Stachura* and the "presumed general damages for a particular loss" authorized by the common-law courts in voting rights cases. Had the settlement agreement in *Vargas* awarded damages for the "inherent value" of a constitutional right, each plaintiff would have received a uniform sum of money. But because the agreement awarded presumed general damages for the "particular loss" sustained by each plaintiff, the three groups of plaintiffs received varying amounts of money, depending upon the circumstances. Those plaintiffs who were prevented from voting received a larger sum than those who were discouraged from voting. And those who were severely harassed received a larger sum than those who were mildly obstructed from voting. There can be such variations in the amount of presumed general damages because the purpose of awarding such damages is to "correct injustice" by fully compensating the individual plaintiffs for their particular losses.

B. Types of Nonmonetary Harms Compensable by Presumed General Damages

In *Stachura*, Justice Powell drew a sharp distinction between presumed general damages for the "inherent" or "abstract" value of a constitutional right and presumed general damages for an "intangible injury" caused by

124. *Id.*

125. *Id.*

126. *Id.* at 22, 29, 36.

127. *Id.* at 30, 36-37. The court had previously ruled that the policy covered constitutional torts. *Vargas v. Calabrese*, 714 F. Supp. 714 (D.N.J. 1989), *aff'd*, 949 F.2d 665 (3d Cir. 1991).

128. *Vargas v. Calabrese*, No. 85-4125, slip op. at 28 (D.N.J. Mar. 5, 1990), *aff'd*, 949 F.2d 665 (3d Cir. 1991). The trial court used the phrase "actual" rather than "presumed general" damages. *Id.* The trial court also ruled that presumed general damages are not "punitive," and, therefore, they are covered by liability insurance. *Id.* at 29-30.

a deprivation of a constitutional right. Unfortunately, he did not draw a comparably sharp distinction between the nonmonetary harm experienced by a voting rights plaintiff, for which presumed general damages are allowed by the common-law courts, and the nonmonetary harm experienced by a procedural due process plaintiff, for which presumed general damages are barred by *Carey*.

The plaintiffs in *Carey* based their requests for presumed general damages on two theories: (1) Such damages should be awarded "for the deprivation of a constitutional right *whether or not* any injury was caused by the deprivation"; and (2) such damages should be awarded because "every deprivation of procedural due process may be *presumed* to cause some injury."¹²⁹ To the extent that the plaintiffs sought presumed general damages for the "inherent value of a constitutional right," which was the gist of their first theory, the damages claimed in *Carey* can readily be distinguished from the damages awarded in *Ashby* and *Wayne*. The damages claimed in *Carey* were for the "abstract" value of a constitutional right; by contrast, the damages awarded in *Ashby* and *Wayne* were for the "nonmonetary harm" caused by a deprivation of a constitutional right.

On the other hand, to the extent that the plaintiffs in *Carey* sought presumed general damages for the "injury" "presumed" to be caused by the deprivation of procedural due process, which was the gist of their second theory, the damages claimed in *Carey* are more difficult to distinguish from the damages awarded in *Ashby* and *Wayne*. In all three cases, the plaintiffs prayed for presumed general damages for a nonmonetary harm that they perceived to be difficult to prove. In *Ashby* and *Wayne*, the plaintiffs were allowed to recover presumed general damages for the injury caused by the denial of the right to vote. Justice Powell described the injury as the "inability to vote in a particular election" and characterized the harm as "nonquantifiable."¹³⁰ In *Carey*, the plaintiffs were restricted to the recovery of proven general damages for the harm caused by the denial of procedural due process. Justice Powell described the injury as "emotional distress" and characterized the harm as "susceptible to proof."¹³¹

Justice Powell never explained the nature of the difference between the nonmonetary harm caused by a violation of the right to vote and the nonmonetary harm caused by a deprivation of procedural due process. In *Carey*, he only compared the harm caused by a deprivation of procedural due process with the harm caused by the publication of a defamatory statement.¹³² He did not describe the harm caused by a violation of the right to vote. In *Stachura*, he discussed the nature of the harm caused by a denial of the right to vote,¹³³ but he never distinguished the harm sustained

129. 435 U.S. at 254.

130. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 311 n.14 (1986).

131. 435 U.S. at 262 n.17.

132. *Id.* at 262-63.

133. 477 U.S. at 311-12 n.14.

by the plaintiffs in *Ashby* and *Wayne* from the harm sustained by the plaintiffs in *Carey*. Consequently, we can only speculate about what Justice Powell must have thought to be the critical differences between the harm caused by a violation of the right to vote and the harm caused by a deprivation of procedural due process. Furthermore, our speculations will have to be based upon what he said in *Carey* about the differences between the harm caused by a defamatory statement and the harm caused by a deprivation of procedural due process.

With respect to the harm caused by a defamatory statement, Justice Powell observed that statements which are defamatory *per se* "are virtually certain to cause serious injury to reputation" as well as emotional distress.¹³⁴ This kind of injury is "extremely difficult to prove."¹³⁵ Nevertheless, due to the "likelihood" of nonmonetary harm and the "difficulty of proving" such harm, the common-law courts allow the recovery of presumed general damages in actions for defamation *per se*.¹³⁶

Is the nature of the harm caused by a deprivation of procedural due process sufficiently similar to the nature of the injury caused by the publication of a defamatory statement to justify an award of presumed general damages? The *Carey* court ruled that it was not for two reasons.

First, Justice Powell thought that the "likelihood of harm" was much greater in actions for defamation. The publication of a defamatory statement to a third person is "virtually certain to cause serious injury" to the plaintiff's good standing in the community, causing the plaintiff to suffer both a loss of reputation and emotional distress.¹³⁷ By contrast, a plaintiff could be the victim of a violation of procedural due process but be unaware of the violation until he or she later consulted a lawyer regarding the perceived substantive deprivation of life, liberty or property.¹³⁸ And, regardless of the timing of the discovery of the procedural violation, the plaintiff might very well "suffer no distress over the procedural irregularities"¹³⁹ because of the unique "ambiguity" regarding the issue of "causation" in actions for deprivations of procedural due process.¹⁴⁰ When a deprivation of life, liberty or property is justified, but procedures are deficient, "whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure."¹⁴¹ There is no comparable ambiguity complicating the issue of causation in an action for defamation. Both loss of reputation and emotional distress are apt to be directly attributable to the publication of the defamatory statement.¹⁴²

134. *Carey v. Phipps*, 435 U.S. 247, 262 (1978).

135. *Id.*

136. *Id.* at 262-63.

137. *Id.* at 262.

138. *Id.* at 263.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

Second, Justice Powell thought that the “difficulty of proving” harm was greater in actions for defamation.¹⁴³ The publication of a defamatory statement causes a harm that “is frequently not susceptible of objective proof” because “[l]ibel and slander work their evil in ways that are invidious and subtle.”¹⁴⁴ By contrast, the emotional distress caused by a deprivation of procedural due process is “a personal injury familiar to the law.”¹⁴⁵ It is “customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.”¹⁴⁶

To summarize, Justice Powell characterized the harm experienced by the *Carey* plaintiffs as “emotional distress,” and he found that “neither the likelihood of [mental and emotional distress] nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”¹⁴⁷ On this basis, he distinguished the harm caused by defamation *per se* from the harm caused by a denial of procedural due process.

Now that we understand what Justice Powell believed to be the critical differences between the harm caused by defamation and the harm caused by a due process violation, we can begin to speculate about what he must have perceived to be the differences between the harm caused by a denial of the right to vote and the harm caused by a deprivation of procedural due process. Focusing first on the “likelihood of harm,” Justice Powell must have thought that any time a plaintiff is denied the right to vote, the plaintiff is “virtually certain” to experience an intangible harm. Unlike the unwitting victim of a procedural due process violation, the plaintiff in a voting rights case is immediately aware of the injury. Also, there is no ambiguity surrounding the issue of causation in a voting rights case. The intangible harm that the plaintiff experiences is directly attributable to the denial of the right to vote.

Turning now to the “difficulty of proving” harm, we must ask ourselves three questions: (1) What did Justice Powell perceive to be the nature of the harms caused by denials of voting and procedural due process rights? (2) What did Justice Powell perceive to be the appropriate remedies for infringements of these rights? and (3) What did Justice Powell perceive to be the “difficulty of proving” the harms for which damages might be recoverable in causes of action for violations of these rights?

With respect to the nature of the harm caused by deprivations of voting rights, Justice Powell’s citations¹⁴⁸ to *Ashby v. White*¹⁴⁹ and *Nixon v. Herndon*¹⁵⁰ suggest that he would have characterized the harm caused by a

143. *Id.* at 263-64.

144. *Id.* at 262 n.17.

145. *Id.* at 263-64.

146. *Id.*

147. *Id.* at 264.

148. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 311 n.14 (1986).

149. 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1703).

150. 273 U.S. 536 (1927).

denial of the right to vote as "private damage . . . caused by . . . political action."¹⁵¹ The right to vote is a "political" right. Interference with the right causes an "intangible injury"—the "inability to vote in a particular election."¹⁵² Emotional distress may be experienced by a voting rights plaintiff, but it is not the primary type of nonmonetary harm caused by a denial of the right to vote.

What does Justice Powell perceive to be the nature of the harm caused by a deprivation of procedural due process? One might take the position that he regards "emotional distress" as the only harm that flows from a violation of procedural due process. Certainly that is the term that he uses to describe the intangible injury for which the *Carey* plaintiffs sought presumed general damages.¹⁵³ However, by focusing on Justice Powell's description of the objectives of procedural due process rules, I would like to advance a different interpretation of his opinion in *Carey*. Justice Powell took the position that procedural due process rules "are meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property" and to "convey to the individual a feeling that the government has dealt with him fairly."¹⁵⁴ These words suggest that the constitutional right to procedural due process is a "procedural" right. One can reasonably infer that an interference with a procedural right would cause an "intangible injury," which might be called the "inability to participate in a hearing prior to being deprived of life, liberty or property." Emotional distress may be experienced by a procedural due process plaintiff, but it is not the only type of nonmonetary harm caused by the violation of this constitutional right.

If my interpretation of Justice Powell's opinion in *Carey* is correct, then one can draw certain analogies between the harm caused by a violation of the right to vote and the harm caused by a violation of procedural due process. Both of these rights are "means" to an end. The right to vote is a means to the end of participating in the political process; a means to participating in the distributive justice process. The right to procedural due process is a means to the end of participating in the judicial (or quasi-judicial) process; a means to participating in the corrective justice process. Consequently, an interference with either of these two rights will cause a peculiar type of nonmonetary harm—an "inability" to exercise a right that represents a means to an end.

Of course, drawing such an analogy might seem to suggest that voting rights plaintiffs should receive the same remedies as procedural due process plaintiffs in constitutional tort litigation. Yet we know that Justice Powell refused to award presumed general damages to the procedural due process plaintiffs in *Carey* while he expressed a willingness through dictum in

151. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

152. *Stachura*, 477 U.S. at 311 n.14.

153. *Carey v. Phipps*, 435 U.S. 247, 262 n.17 (1978).

154. *Id.* at 259-62.

Stachura to award presumed general damages to voting rights plaintiffs. To understand how Justice Powell could have taken two such apparently inconsistent positions, we must now examine the types of remedies that he perceived to be available for infringements of voting and procedural due process rights.

With respect to remedies for voting rights violations in a case like *Ashby v. White*¹⁵⁵ or *Nixon v. Herndon*,¹⁵⁶ Justice Powell thought that there was only one appropriate remedy—damages. Injunctive relief was not an available remedy because election day had passed, and the plaintiffs had not complained about any threats of future misconduct. With respect to remedies for procedural due process violations in a case like *Carey*,¹⁵⁷ Justice Powell perceived that there were two appropriate, complementary remedies—prospective injunctive relief and retrospective damages. The plaintiffs in *Carey* had obtained a temporary restraining order and a preliminary injunction from the trial court ordering the defendants to reinstate them until such time as the defendants had conducted an appropriate hearing.¹⁵⁸ In addition, the plaintiffs were allowed to claim compensatory damages for the past harm that they had sustained during the brief period of time in which they had been suspended from school without a hearing. These compensatory damages were divided into (1) general compensatory damages for the harm “caused by the denial of procedural due process itself,”¹⁵⁹ and (2) special compensatory damages for the harm “caused by the suspensions,” provided the suspensions were proven to have been unjustified.¹⁶⁰

Now that we understand what types of remedies Justice Powell considered appropriate for infringements of voting and procedural due process rights, we can determine what types of harms he perceived to be compensable through damages. And once we have identified these types of harms, we will be in a position to speculate about why he ruled that presumed general damages are not recoverable for violations of procedural due process rights in a case like *Carey*, but might be recoverable for violations of voting rights in a case like *Ashby* or *Nixon*.

Because the only available remedy in a voting rights case like *Ashby* or *Nixon* is damages, all of the intangible harms that a plaintiff suffers as a direct result of the deprivation of the right to vote must be redressed through an award of compensatory damages. Specifically, the award must be sufficiently substantial to compensate the plaintiff for the “intangible injury” that Justice Powell described as the “inability to vote in a particular election” as well as any emotional distress that the plaintiff might have

155. 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1703).

156. 273 U.S. 536 (1927).

157. 435 U.S. at 247.

158. *Id.* at 250-51. Phipps was readmitted under a temporary restraining order after 8 days of his 20-day suspension; Brisco was readmitted during the pendency of proceedings for a preliminary injunction after 17 days of his 20-day suspension. *Id.*

159. *Id.* at 263.

160. *Id.* at 260.

experienced.¹⁶¹ Justice Powell characterized the intangible harm in a voting rights case as a "nonmonetary harm that cannot easily be quantified,"¹⁶² and he suggested that presumed general damages might be an appropriate remedy for such a loss because it is "likely to have occurred but difficult to establish."¹⁶³

By contrast, in a procedural due process case like *Carey*, there are two complementary remedies to rectify the wrong to the plaintiff. The primary remedy is specific relief. Through the issuance of both pretrial and permanent injunctions, the court orders the defendant to conduct a hearing in accord with the requirements of procedural due process. The award of compensatory damages is a secondary remedy designed to make the plaintiff whole by redressing whatever losses have not been corrected by the issuance of the injunction. Justice Powell must have viewed the denial of procedural due process in a case like *Carey* as a single wrong that can be completely corrected by the issuance of injunctive relief. Put another way, he must have concluded that the harm which I have characterized as the "inability to participate in a hearing" is fully rectified by the grant of specific relief. If my speculation is correct, then the only intangible loss remaining to be redressed by an award of general compensatory damages is "emotional distress," which Justice Powell characterized as a nonmonetary harm "susceptible to proof."¹⁶⁴ Consequently, he ruled that proven general damages are an adequate remedy in procedural due process cases like *Carey*.

In summation, it is my conclusion that Justice Powell refused to award presumed general damages in a procedural due process case like *Carey* because he believed that the grant of injunctive relief corrected the plaintiff's "inability to participate in a hearing conducted in accord with the requirements of procedural due process." "Emotional distress" is the only harm for which general compensatory damages remain to be awarded, and that is a harm "susceptible to proof." Consequently, proven general damages are an adequate remedy. By contrast, Justice Powell expressed a willingness to allow the recovery of presumed general damages in a voting rights case like *Ashby* or *Nixon* because compensatory damages are the only available remedy, and it would be difficult for the plaintiff to prove the value of an "inability to vote in a particular election."

CONCLUSION

It is the thesis of this article that *Carey* and *Stachura* leave open the question of whether presumed general damages will ever be recognized as a remedy in constitutional tort litigation. *Carey* held that presumed general damages are an inappropriate remedy for violations of procedural due process, and *Stachura* held that presumed general damages may never be

161. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 311 n.145 (1986).

162. *Id.*

163. *Id.* at 310-11.

164. *Id.* at 262 n.17.

awarded for the inherent value of a constitutional right. Nonetheless, Justice Powell indicated in both opinions that presumed general damages might be recoverable for a nonmonetary harm that cannot easily be quantified. As an example of such a harm, he discussed the injury caused by a deprivation of the right to vote. He acknowledged that presumed general damages are recoverable in common-law voting rights cases, and he suggested that they also might be recoverable in constitutional tort cases.

The harm caused by a deprivation of the right to vote satisfies Justice Powell's three criteria for an award of presumed damages. First, the harm is nonmonetary or intangible. Second, the harm is one that is likely to occur. And third, the harm is difficult to prove by objective evidence. Because the harm caused by a deprivation of the right to vote possesses these three characteristics, and because compensatory damages are the only available remedy in a voting rights case like *Ashby* or *Nixon*, an award of presumed general damages can be justified in such cases by reference to Professor Weinrib's theory of corrective justice. The courts must allow the recovery of presumed general damages in cases like *Ashby* or *Nixon* because, without this remedy, there would be no way for a court to ensure that the award of compensatory damages to a voting rights plaintiff would be sufficiently substantial to "correct the injustice" done by the defendant.

